> "The courts have the right to determine whether the power to take property for a public use is being abused."

No such conclusive evidence obtains in Illinois as is provided for in California practice. Petitioners respectfully submit that they have contended at all stages of these proceedings that respondent Board has abused its discretion and that petitioners are entitled to a hearing thereon.

IV. PETITIONER WAS OWNER BY VIRTUE OF EQUITABLE CONVERSION.

The second issue petitioners present to this court was whether petitioners had been deprived of just compensation within the meaning of the Fourteenth Amendment when they were prevented by Illinois courts from presenting the issue of severance damages to a jury. The substance of the only answer given by respondent Board is that, petitioners-landowners only had an option since the November, 1962 agreement (Sep. App. pgs. 40-45) under which they were purchasing contained a liquidated damages clause. Respondent Board completely disregards all other parts of this agreement. Even if the liquidated damages clause causes this agreement to be considered solely an option, under applicable Illinois law the option must be considered to be exercised for eminent domain purposes.

Respondent Board cites two Illinois cases to sustain its claim the November 1962 agreement is an option. Only one is an eminent domain case, *City of Chicago* v. *Blanton*, 15 Ill. 2d 198, 154 N. E. 2d 242 (1958), and that involves only a valuation problem, not severance damages, where:

> "An executed contract to purchase property being condemned which provided that vendee had the option within a year to rescind the contract to purchase and forfeit as liquidated damages a certain initial payment was no more than an option to purchase and not ad-

> missible to show market value where other sales evidence had been introduced." Eminent Domain in Illinois, Righeimer & Righeimer, pg. 46 (1962).

The Illinois Appellate Court in its opinion (#54685, A. 21) considered the November 1962 agreement's liquidated damages clause as making the agreement an option and cited *Keogh* v. *Peck,* 316 Il. 318 (1925) for the proposition that no interest in land is created in the holder of an option by an option agreement.

That is *not* the law in Illinois. The basis for that proposition is found at pg. 332 of the *Keogh* case where *Gall* v. *Stoll,* 259 Ill. 174, 180 (1913) is cited. *Gall* v. *Stoll* at page 180 relies on *Chappell* v. *Knight,* 108 Ill. 570, and *Walters* v. *Walters,* 132 Ill. 467, *inter alia.* The Illinois Supreme Court said in 1962:

> "While the Chappell case was one at law (ejectment) and therefore the equitable doctrine did not apply, nevertheless, it was cited with approval in some subsequent equity cases. (See e.g., Walters v. Walters, 132 Ill. 467, 23 N. E. 1120; Gall v. Stoll, 259 Ill. 174, 102 N. E. 225.) We believe the correct view to be that expressed in the majority of the cases which hold equitable conversion takes place at the instant a valid and enforceable contract is entered into and that the buyer at that time acquires an equitable title. To the extent that the Chappell case and those following it are inconsistent with this view they are hereby expressly overruled."

Shay v. *Penrose,* 25 Ill. 2d 447, 185 N. E. 2d 218, 220 (1962). Petitioner here thus stands in the position of being denied severance damages as a result of the Illinois court's ruling based on a principle which has long been discarded.

It is logically inconsistent for respondent Board to argue, on one hand that this is only one unified site and, on the other, nothing outside of the property lines of an individual parcel has any effect on the owner's rights thereto.

V. CONCLUSION.

In conclusion, we respectfully submit that the two issues presented to the court herein involve substantial constitutional questions. No hearing was afforded these defendants under the circumstances of this case after the cause was remanded for such purpose. The second issue presented is that petitioners were denied any severance damages to the property remaining after the taking herein. Petitioner has been denied any right to damages on a principle of law which has been specifically overruled. Further, respondent Board's argument that the agreement is only an option is refuted by its sales features, the number of rights given the purchasers, and the fact conveyances had already occurred pursuant to its terms. Even if it is an option, it must be considered under Illinois law to be exercised. Finally, since a leasehold interest would be entitled to severance damages, under these circumstances to hold that Sec. 11 of the Illinois Eminent Domain Act does not provide that damages be awarded these petitioners would render such section unconstitutional, as a deprivation of property without due process. Petitioners respectfully iterate their prayer that a Writ of Certiorari issue to the Supreme Court of Illinois.

Respectfully submitted,

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